UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT.

No. 15,887.
Civil Action.

CLINTON FOODS, INC., a Delaware Corporation,
Appellant,

vs.

MARVIN YOUNGS,
Appellee.

Appeal from the United States District Court for the Southern District of Iowa.

APPELLANT'S BRIEF AND ARGUMENT

In Reply to Supplemental Brief and Argument.

(Foreword eliminated as dealing with matters not now under consideration.)

DISCUSSION OF AUTHORITIES CITED BY APPELLEE.

The cited and quoted sections of Restatement of the Law of Torts constitute general rules as derived from the decisions of many courts. The Iowa law is stated in **Gowing**

v. Henry Field, 225 Iowa 729, 281 N. W. 281, and is limited to warning of the dangers if warning be necessary. This rule was reaffirmed by the Iowa Court in **Atherton v. Hoenig's Grocery** (Iowa, 1957), 86 N. W. 2d 252.

Appellee cites authority for the proposition that the kind of warning and its adequacy are to be determined by the circumstances of the moment, changing as the circumstances change. Had Clinton done something during the course of the project to increase or change the danger to appellee, perhaps it would have been bound to warn him. However, any change was wrought by appellee's employer.

For purposes of drawing an analogy, let us assume that a specific warning had been given as to the very wire by which Mr. Youngs was injured. Does the action of Pittsburgh, his employer, in bringing him closer to the wire, constitute such a change as to make it incumbent upon Clinton to warn further?

If a man standing on the ground were warned that the tenth rung of a ladder is weak and the person whose duty it is to warn discovers that another rung is also weak, he must warn of the additional peril. Does he, however, have to warn again because the man has climbed to the sixth rung and is therefore closer to the original danger? If the warning was originally adequate no repetition of it can serve any purpose.

ARGUMENT.

Appellant Was Under No Duty to Warn.

Appellee states that we have conceded a duty to warn. This is not true. We have merely urged that if neither the appellee nor his employer was aware of the danger and the duty to warn therefore arose, it was discharged. We contend, and have throughout this appeal, that no duty to warn was ever imposed.

Mr. Youngs was admittedly aware that the enclosure in which he was working contained 13,200 volts. He recognized the transformers as such and knew that they must have been equipped with lead in wires. It is inconceivable that he could fail to recognize the wire in question as such. He contends that a lead in wire should be bare. However, there were no bare wires, so it must have been obvious that these transformers had no bare lead in wires. He had had far more experience in transformer areas than has the average person. What could the wire which injured him have been if not a lead in wire? If it was not, where was the lead in wire? The only wire which could be the lead in to the particular transformer was the wire involved.

His other reason for disclaiming any knowledge of the danger presented is that high voltage wires are commonly out of reach. Mr. Youngs knew that the wires were all out of reach until such time as the dirt was piled against the transformer base and he knew that Pittsburgh had piled it there. If he attributes such significance to the position of the wire in determining potential danger, he certainly should have been suspicious of the one which injured him.

There can be no question as to whether Mr. Morgan knew. His testimony, to which we have on several occasions alluded, proves to a certainty that he knew the wires were hot. Whether or not the insulation misled Mr. Youngs, it did not mislead Mr. Morgan.

That being the case, no duty to warn ever arose. We have cited authority for the proposition that knowledge of, or warning to, the employer, is a complete defense to this cause of action.

If **either** Mr. Youngs **or** Mr. Morgan knew of the danger, appellant was not bound to warn of it.

The Warnings Given Were Adequate.

Appellee dismisses a warning that the area was "hot" as meaningless because any voltage in the area would be sufficient to render it "hot". If this argument were sound, a warning to a furnace repairman that a basement contains hot wires could be disregarded. Does a home owner customarily warn his guests that there are hot wires and outlets in his living room? If he so warns them are they justified in assuming that such wires and outlets are not dangerous? Any person warned of the existence of hot wires knows beyond question that he is being warned of **dangerous** wires and, if he has been warned that an enclosure carries 13,200 volts, he certainly cannot assume that a warning that the whole area is hot means only that there is some electrical energy present.

It is contended that the concrete base and the transformers themselves were not hot and therefore a warning that the entire area was hot was insufficient. Let us be realistic about what Mr. Youngs must have understood from this warning. Can the Court believe that even a child would be misled by this warning? Had Mr. Youngs been informed that part of the enclosure was hot, we would have a different situation. He was informed and his employer was informed that it was all hot. This meant that the items which **might** be hot, not the casings or the concrete base but any wires or bus bars, were hot and they **all were.**

Appellee argues that the particular wire and the bus bar were the only hazards but this is not the fact—See

Shannon's testimony (Record p. 9). Actually the warning was better than pointing out the specific hot wires would have been because, had the latter course been adopted, and had one wire been overlooked, a person injured by that wire would have just ground to complain. If an entire shipment of medicine contains poison, is it not at least as effective to say "the whole shipment contains poison" as to point to each bottle and say "the liquid in that bottle contains poison?" Surely, no one receiving the former warning would consider the freight car, the cases, or the exteriors of the bottles and caps as dangerous, but everyone would be aware of the true situation.

Assuming a warning to have been necessary, the effectiveness of that warning must be judged by whether it apprised Pittsburgh of the danger. Even if, as an abstract matter, it would not have been reasonably calculated to do so, that fact would be immaterial. The injury to Mr. Youngs does not negative the fact of adequate warning. If the specific wire had been pointed out to him he might still have been injured by it. After all, this is not a case involving one who deliberately grabbed a wire. If it were, appellee would have been precluded from recovery by his own negligence. He inadvertently backed up close to the wire and it was closer than he thought when he turned to walk toward the pump house. This could well have happened no matter how explicit the warning.

The record discloses that the warning did alert Mr. Morgan to the danger. He was not misled by the alleged generality of it nor by warnings as to the bus bar. He **knew** of the danger from the wires. The warnings served their calculated purpose insofar as he was concerned. How then can it be contended that they were inadequate?

Appellee persists in harking back to the bus bar warnings. It is urged that "Mr. Shannon's bus bar warnings were prolific and continuous from the time work started

in the area until the injury." The record cannot conceivably be so construed. If they were, whom did he warn? Certainly not any member of appellee's crew, and certainly not the appellee himself who never heard Shannon mention the bus bar.

Mr. Shannon obviously warned the ditch digging crew members, and them alone. The reason is obvious. They had raised the ground level in a narrow areaway and were walking past the bus bar with shovels of dirt. The entire width of that areaway was less than the nearest edge of the ditch was from the lead in wire. He never warned the pipe fitters about the bus bar. As argued, they were not close to it and appellee never even saw it.

If the pipe fitters were warned about the bus bar, the warning came from their foreman who had received only one warning about it and that in connection with his direction of the ditch diggers. If Mr. Owen was led to believe that the bus bar was the only danger, he was misinformed by his foreman who **knew** of the danger of the wires.

Finally, in discussing adequacy of the warning, we wish to discuss Mr. Youngs' disclaimer of any awareness of the danger. The mere denial that he was aware of it does not create a jury question. Suppose Mr. Youngs had been told that the wire contained 13,200 volts but testified that he did not know that such a voltage would hurt him. Under appellee's apparent theory, it would have been the province of a jury to determine whether he had been adequately warned. Certainly the rule that the evidence must be considered in the light most favorable to the plaintiff could not be perverted to that extent. We cannot conceive that the Court can entertain any serious doubt as to whether Mr. Youngs was aware of the danger.

Pittsburgh Was Negligent in Performing Its Duties Owed Appellee.

Despite appellee's contention that control of the job was in Clinton, the record discloses that Pittsburgh was responsible for labor, materials, tools, supervision and methods in the performance of the contract (Record pp. 33 and 34).

Who was responsible for Mr. Youngs' injury? The answer to that question lies in the answers to the following questions:

1. Was Mr. Youngs misled?
2. If so, who misled him?
3. Who brought him into proximity to the wire?

We feel that the first of these questions has been answered. Appellee had worked on an 11-month project at a power plant of Iowa-Illinois Gas & Electric. He was not an electrician but had far greater than average knowledge of transformers and their connections. He knew a bus bar when he saw one. He knew a lead in was necessary. He saw signs warning of the voltage on the fences and telephone poles. The evidence discloses that a pole bearing such a sign was at the very edge of the ditch near the transformer bank and had to be cabled to keep it from sliding in. This pole appears in Exhibit 4. Mr. Shannon testified that according to his recollection there was a sign on the base of the transformer bank (Record p. 13). He further testified that he cautioned the men every day that the transformers were hot. Every warning from Clinton indicated danger around **every** transformer connection. At the very least he knew that there were wires containing 13,200 volts and that these wires were insulated, and there was no basis from any act of Clinton which would warrant him in ignoring the danger lurking in the wire which injured him.

If he was misled by the nature of any warnings, they must have come from his foreman or fellow workmen. The bus bar warning to him certainly did not come from Clinton. Mr. Morgan told the men about the bus bar but he knew the wires were hot and the transformers were hot. He further knew that the work of the pipe fitters would not take them close to the bus bar. If he misled his crew it was purely of his own volition and despite his knowledge of the situation.

At this point we digress to discuss the import of the words, "hot transformers." Appellee apparently feels that this was misleading because parts of the transformers were not hot. Certainly, such a quibble over terms cannot be taken seriously. The import of the words was obviously that they were hot at the places that hot transformers are dangerous, just as an electrician in indicating a fuse box will say "that box is hot." He doesn't mean that the door can't be opened or, indeed, that a fuse cannot be removed. He means that energy is flowing to it in the commonly dangerous areas, it is dangerous.

Thus, when Mr. Shannon warned daily that the transformers were hot and when Mr. Morgan testified that "I personally knew these transformers were hot" (Record p. 20), the former warned of, and the latter understood, the condition precisely as it existed at all times during the progress of the work.

As to the third question, let us consider the position of appellee's employer, Pittsburgh. It had absolute knowledge of the danger involved in the lead in wire. It had absolute control of methods, tools, labor and supervision. Above all it, and it alone, had the absolute duty to provide a safe place for its employees.

Despite its knowledge and despite its control over methods, Pittsburgh caused the ditch to be laid out by Mr. Morgan and excavated by its crew, and permitted that

crew to pile the dirt at such a point that the men could reach the lead in wire which they could not otherwise have reached.

Pittsburgh decided that the pipe should be drifted in with a chain and, to that end, placed the plank, the end of which rested upon the transformer base. This it did despite Mr. Morgan's testimony that **"we usually use a crane but we didn't have any"** (Record, p. 16).

Pittsburgh not only failed to provide a safe place to work, but took its men **from** a safe place to work to a place of danger. It is not, as appellee has heretofore contended, a matter of Clinton's having delegated these matters. It was Pittsburgh's province to excavate the ditch, pile the dirt where it wished and use a chain to swing the pipe in, and Clinton did not, and could not under the contract, supervise these matters. It was Pittsburgh's duty to provide a safe place to work and **Clinton had no such duty.**

Has the primary question not been answered? Is it not obvious that Pittsburgh was **solely** responsible for bringing appellee into the danger zone and solely responsible for misleading him if he was misled?

Pittsburgh's Knowledge Precludes Recovery by the Appellee.

For the purpose of this case it matters not whether Mr. Morgan's knowledge was derived from Clinton's warnings or independently thereof.

As we have consistently urged, if Pittsburgh was aware of the danger, the only duty which could have been imposed upon Clinton by Iowa law never arose.

Appellee has endeavored to answer this contention by the claim that the knowledge never reached Mr. Youngs. That is beside the point. The knowledge of Pittsburgh is a defense to Clinton whether or not appellee had knowl-

edge. It will be noted that in **Engle v. Reider**, 366 Pa. 411, 77 A. 2d 521, there was admittedly no warning to the victim.

This position is demonstrated by the decisions involving lease arrangements, one of which is Willis v. Snyder, 190 Iowa 248, 180 N. W. 290. The Iowa decisions have been based purely upon whether the lessee was aware of the danger and have generally involved plaintiffs who had absolutely no knowledge of the danger. In short, the question is not "Did the injured party know," but "Was the lessee aware, either by, or independently of, warning!"

The distinction is made by the Iowa Court in **Atherton v. Hoenig's Grocery** (Iowa 1957), 86 N. W. 2d 252, wherein it said:

> "It must be kept in mind that we are discussing the question of the negligence of the defendants rather than contributory negligence of, or assumption of risk by, the plaintiff."
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> • • • • • • •
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> "But we are not here concerned with contributory negligence or assumption of risk; rather with the **primary negligence of the defendants.** The Possessor of real estate is **not an insurer** of the safety of those who come upon his premises by invitation, express or implied. Negligence is predicated upon an unperformed duty. The duty owed by the inviter is to those, and to those only, who do not know, or, in the exercise of reasonable care for their own safety, have no reasonable means of knowing, of defects or dangers. He may avoid liability in two ways: by, making and keeping his lands safe, or **by warning of the dangers.**" (Emphasis supplied.)

It is clear that if the possessor of real estate performs his duty, he cannot be held liable, because he has not been negligent and is not an insurer.

The duty of the contractor to control, advise and, if necessary, warn his employees is consistently recognized by contractors and those who deal with them. Were it otherwise, a property owner could never feel secure in the knowledge that he had discharged his duty to warn. Suppose Mr. Shannon had discovered that the pipe was not following the line called for in the plan. Would he complain, or explain, to Mr. Youngs, Mr. Owen or Mr. Sullivan? Of course not. He would talk to Mr. Morgan who would order the men to correct the deviation from the plan.

Indicative of the situation and Mr. Youngs' understanding of it is his testimony relative to the bus bar warning he received:

> "Either Mr. Morgan or Mr. Owen made the statement about the bus bar, **because Mr. Morgan was foreman of the job. He naturally was the fellow who gave us all our orders** and Mr. Owen was, at that time, more or less his right-hand man on the job. **Any warnings would have to come from one or the other of those men**" (Record, p. 31).

Appellee, in his Supplemental Brief and Argument, says that appellant had assumed the duty of warning the men or at least the men could so believe. We fail to see how appellee could so believe because, according to him, he had **never** had **any** conversations with **any** of Clinton's personnel about hazards. He had seen Mr. Shannon only twice in five weeks on the job and then in areas other than that involved and "on neither occasion was comment made about the area" (Record, p. 30).

CONCLUSION.

We contend that appellant's only duty under Iowa law was to warn if the danger was unknown both to appellee and his employer.

We submit that the warnings given were adequate. They certainly apprised the foreman, Mr. Morgan, of the situation. The warnings certainly did not mislead Mr. Youngs, because he denied ever having discussed the matter with any employee of Clinton. He was taken into the zone of danger by his employer and, if he was lulled into a feeling of security, it was his employer who did it.

We respectfully urge that the original judgment of this court reversing the judgment below was right and should be reinstated.

Respectfully submitted,

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INDEX.

Page

Statement of grounds 125

Ground III. The majority opinion fails to recognize the knowledge of appellee's employer and the legal proposition that such knowledge provides a conclusive defense 126

Certificate of counsel 129

Cases Relied Upon.

American District Telegraph Co. v. Kittelson (C. C. A. 8, Iowa), 179 F. 2d 946 126

Engle v. Reider, 366 Pa. 411, 77 A. 2d 621 126

Gowing v. Henry Field Co., 225 Iowa 729, 281 N. W. 281 128